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In The

Supreme Court of the United States

October Term, 1990

IN RE: STATE OF LOUISIANA *EX REL.* WILLIAM J. GUSTE, JR., ATTORNEY GENERAL, AND WILLIAM J. GUSTE, JR., IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF LOUISIANA,

Petitioner,

Petition For Writ Of Mandamus To The United States Court Of Appeals For The Fifth Circuit And/Or The United States District Court For The Eastern District Of Louisiana

ATTORNEY GENERAL GUSTE'S REPLY BRIEF

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ARGUMENT

Several material misstatements of fact and law taint Respondents' Brief. We recite them, item for item, in order of glaring inaccuracy:

First. Surely the circumstances here are "drastic" and warrant extraordinary relief by way of mandamus. Attorney General Guste has been denied his constitutional office and the district court below has restructured Louisiana's constitutional form of government by its holding that "the Governor, as head of the executive branch, is the primary representative of the State herein and, as such, may dictate the State's course in this litigation." *United States v. Louisiana,* 751 F. Supp. 608, 617 (E.D. La. 1990). This holding violates the plain language of Art. IV, § 8 of the Louisiana Constitution of 1974, and an unbroken line of Louisiana jurisprudence holding that the Attorney General is the Sovereign's voice in court: "[H]e being charged with the duty of representing the state in all judicial proceedings in which the state has an interest, either as plaintiff, defendant, or intervenor." *State ex rel. Porterie, Attorney General v. Walmsely,* 160 So. 91 (La. 1935). Again,

> "The Attorney General has unquestionably the right to file suit in the name of the State and he is not required to obtain the permission of the Governor or any other executive or administration officer or board in order to exercise it. This power and duty is inherent in him in the nature of things and has been specially charged to him by the people themselves in the Constitution."

State v. Texas Co., 7 So.2d 161, 162 (La. 1942). *Accord, Saint v. Allen,* 134 So. 246, 248-49 (La. 1931); *State v. Bank of Louisiana,* 5 Mart. (N.S.) 327, 344 (La. 1827). The district court's holding is also contrary to every state supreme court decision in which similar clashes between Governor and Attorney General have been litigated. *Feeney v. Commonwealth,* 366 N.E.2d 1262 (Mass. 1977); *Martin v. Thornburg,* 359 S.E.2d 472 (N.C. 1987); *Ex parte Weaver,* 570 So.2d 675 (Ala. 1990). See also, *Graddick v. Newman,* 453 U.S. 928, 942 (1981) (Opinion of Rehnquist, J.) ("the Alabama

Supreme Court consistently has held that the Attorney General's authority is independent of the Governor"). And what does Governor's counsel say of these authorities? Nothing.

The gross violation of state sovereignty manifest in the removal of *Guste v. Roemer* to federal court raises "considerations of comity between state and federal courts," *Roche v. Evaporated Milk Assn.*, 319 U.S. 21, 31 (1943), that alone justify issuance of the extraordinary writ of mandamus. *Hernandez-Agosto v. Romero-Barcelo*, 748 F.2d 1 (1st Cir. 1984), *stay of mandamus denied by the full Court*, 469 U.S. 927 (1984). Congress has decreed that "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over case removed from state court], the case *shall be remanded.*" 28 U.S.C. § 1447(c) (our emphasis). The lack of federal subject matter jurisdiction over Attorney General Guste's state court petition is patent on the face of the petition. Removal was improper and Attorney General Guste has been denied his "right to sue in Louisiana Court–the forum of [his] choice." *Primate Protection League v. Tulane Education Fund*, ___ U.S. ___, 59 L.W. 4424, 4425 (May 20, 1991).

That the state representation question was pending in federal court, as ancillary to the merits in No. 80-3300, has no effect whatever on Attorney General Guste's exercise of his right to resort to the courts of Louisiana for a definitive resolution of the dispute between the Governor and the Attorney General. As Justice Rehnquist (as he then was) has said: "We have never viewed parallel in personam actions as interfering with the jurisdiction of either court." *Vendo Co. v. Lektro-Vend. Corp.*, 433 U.S. 623, 642 (1977). And more:

> "[A]n action brought to enforce [a personal liability] does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court."

Kline v. Burke Construction Co., 260 U.S. 226, 230 (1922). It is simply not true that "Mr. Guste's state court petition constituted no more than an eleventh hour attempt to interfere with the court's proceedings by placing before a state court the very issue remanded to the district court for determination." Brief for Respondents, p. 17. The district court below, no doubt, would have ruled as it saw fit. Our point is that "the state and federal courts had concurrent jurisdiction in this case, and neither court was free to prevent either party from simultaneously pursuing claims in both courts." *Atlantic C. L. R. C. v. Engineers,* 398 U.S. 281, 295 (1970). What Justice Black said about the strictures of the "All Writs Act," 28 U.S.C. Sec. 1651, applies with equal force to Congress's severely limiting removal jurisdiction:

> "[I]t is certainly likely that one reason stemmed from the essentially federal nature of our national government. When this Nation was established by the Constitution, each State surrendered only a part of its sovereign power to the national government. . . . One of the reserved powers was the maintenance of state judicial systems for the decision of legal controversies."

Id. at 285. It strains credulity to think that Justice Black, the voice of "Our Federalism," *Younger v. Harris,* 401 U.S. 37, 44 (1971), would sit still for one moment in the face of the Governor's removal of Attorney General Guste's Petition from State Court. And it is the law in Alabama, as in Louisiana, that:

> "The Attorney General is a constitutional officer and member of the Executive Department of the State government. Constitution 1901, section 112. The statutory authority of the Attorney General . . . provides: 'The attorney general is authorized to institute and prosecute, in the name of the state, all suits and other proceedings at law or in equity,

> necessary to protect the rights and interests of the state.'
>
> "The authority conferred on the Attorney General by the foregoing statute is not inconsistent with the authority conferred on the Governor by Title 7, section 73, Code of 1940."

McDowell v. State, 8 So.2d 569, 570 (Ala. 1942) (citation omitted); *accord, Graddick v. Newman,* 453 U.S. 928, 942 (1981) (Opinion of Rehnquist, J.). Neither under the rubric of "artful pleading" nor under the rubric of removal jurisdiction should this case have been divested from the Civil District Court for the Parish of Orleans, which was *constitutionally* "free to proceed in its own way and in its own time, without reference to the proceedings in the other court." *Kline v. Burke Construction Co.,* 260 U.S. at 230.

Moreover, time plainly is of the essence here, since Attorney General Guste's term of office expires January 13, 1992, and he has publicly announced that he will not seek reelection. Unless mandamus issues now, it is likely his efforts to vindicate the prerogatives of his office and his personal integrity, which has been impugned by the district court ("willful violation" of ethical rules), 751 F. Supp. 616, and by Governor's counsel here ("his willful violation of procedural and ethical standards"), Respondents' Brief, p. 21 *et seq.*, will be dismissed as moot. Remedy by appeal is plainly inadequate and mandamus should issue to correct the drastic disruption of state sovereignty and the patent disregard of the strictures of removal jurisdiction evident in the holding below.

Second. Governor's counsel accuse Attorney General Guste of claiming

> "that *he did not know* and could not reasonably be expected to know that a single board might have been part of the district court's remedy. Since that

> time, Mr. Guste has offered no explanation for his prior statements before this Court." (our emphasis)

Governor's Brief, p. 26. This accusation of "misrepresentation" (p. 26) and of "making false statements" (p. 24) in violation of the rules of Professional Conduct is recklessly untrue. Attorney General Guste has never claimed that *he did not know* a single-board remedy was in the offing. What General Guste told this Court was that he "*did not and could not reasonably expect* that the abolition of the four boards of higher education would become part of the remedial scheme *actually ordered* [by the trial court]." Supercession Motion (Appendix at 43a). Governor's counsel add: "The absolute falsity of Mr. Guste's assertion regarding the single board issue is easily exposed upon review of that remedy's substantial history in the case." Governor's Brief, p. 25. This is another attempt to convert General Guste's legal judgment into false swearing, but it will not do. For fifteen years of this litigation, the United States of America, the sole complainant, never once advanced such a remedy. There is nothing in the Constitution of the United States or Title VI of the Civil Rights Act of 1964 which prohibits a state from having four boards of higher education with divided functions, instead of one board with consolidated functions. Indeed, the abolition of four boards created in 1975 is hardly a rational approach to removing any vestiges of prior *de jure* segregation that existed long ago under one general board. Nor could the Attorney General reasonably anticipate that Governor's counsel, enrolled as *additional* counsel for the State by the Attorney General, would oppose General Guste's application for a stay and move to oust the Attorney General as post-trial counsel for the State. Governor's Roemer's counsel seek to convert their limited enrollment as trial counsel on remedy, proffering

the Governor's policy choices,[1] into an unlimited tenure to deny the Sovereign will of the State all the way to the Supreme Court of the United States. This is not Louisiana's system of constitutional order, nor of any other state in the Union.

As for the assertion that "Mr. Guste has offered no explanation for his prior statements before this Court" (Governor's Brief, p. 26), we direct Your Honor's attention to the opening of our Memorandum in Opposition to Governor Roemer's Motion to Dismiss in the Supreme Court of the United States, Oct. Term 1989, No. 89-556, wherein General Guste explained to this Court:

> "The short answer – and all we need say here – is that Attorney General Guste sincerely believes, as we have shown in our Jurisdictional Statement, that it was beyond the equitable, remedial authority of the district court to abolish Louisiana's multiple board higher education structure on the record below. Given this court's ruling in *Minnesota State Senate v. Beens,* 406 U.S. 187, 197, 200 (1972), which the Governor's Counsel's Motion to Dismiss ignores, the Attorney General stands by his assertion and he disagrees entirely with the Governor's Counsel's view (State of Louisiana Opposition to Application for Stay, p. 18) that 'the remedy does not represent an over-intrusive infringement by the federal court on Louisiana's interest in managing its

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[1] Contrary to the impression Governor's counsel attempt to convey, even the District Court found that during the State's defense on liability, "Mr. Kennedy was not enrolled as counsel in the case and did not actually participate in the State's defense nor in the preparation of the [State's liability] memorandum." (Guste App. 6a). See also Decuir Affidavit (Guste App. pp. 53a-56a).

> own affairs.' Nowhere has Attorney General Guste denied knowing that the Governor and his counsel favored the single-board remedy. The supposed 'bald assertion that he did not know about the single board issue,' recited in the Governor's Motion to Dismiss, p. 12, comes out of thin air."

So too, here, Governor's counsel's assertion of "the Attorney General's prior claims of ignorance as to the Governor's proposed remedy" (Brief, p. 25) is pure fiction and, we hasten to add, wholly undocumented.

Third. Governor's counsel mistakenly assume that the judgment designating Kennedy and Levin as "*sole* trial counsel representing the State of Louisiana in Civil Action No. 80-3300." 751 F. Supp. at 620 (our emphasis), "necessarily determined the entirety of the Attorney General's declaratory judgment suit," Governor's Brief, p. 9. It is a fact that the trial is over; the case has been dismissed, ironically, by the district court on General Guste's post-trial motion for relief from judgment. R. Doc. 452. An obvious question is who will represent the State of Louisiana on the United States' appeal of the judgment dismissing No. 80-3300 on the merits? The judgment below says nothing at all about Louisiana's legal representative *on appeal.* We say that Attorney General Guste is Louisiana's lawyer on appeal, not Governor Roemer, who all along has pushed his "political agenda for reform of higher education," 751 F. Supp. at 612, contrary to the constitutionally-mandated, four-board structure specifically chosen by Louisiana's people. Nothing in the record contradicts Attorney General Guste's sworn statement that (Guste App. 47a):

> "I permitted the enrollment of the Governor's counsel as an accommodation to the Governor so as to

> allow him to tender whatever remedial ideas he had to the Court."[2]

Mr. Kennedy specifically requested that he and other counsel be enrolled "in order that they may appear and present the position of the Governor in the remedy phase of this litigation." Decuir Affidavit, Guste App. at 54a. Given these uncontradicted affidavits, the short answer to Governor's counsel's repeated cries that General Guste "sought to reverse the State's position on remedy" (Governor's Brief, p. 4) and that "the Attorney General attempted to obstruct the orderly resolution of the case by seeking to change the State's position on remedy and removing its counsel at the last minute, after the case was virtually over" (Governor's Brief, p. 17), is that, indeed, the trial was over. Thereafter Attorney General Guste was faithfully fulfilling his sworn constitutional duty to defend the Louisiana Constitution and state laws against unwarranted judicial attack. This is precisely what the Louisiana Constitution, Art. IV, Section 8, and state law, La. R.S. 49:257(B), require of him. What's more, given the final judgment merger rule, *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 588 (1926), it can hardly be said that "Mr. Guste belatedly re-entered the case" (Governor's Brief, p. 25). To quote Justice Rehnquist (as he then was): "I am surely not surprised that this Attorney General has taken exception to an order opening the doors of the State's

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[2] In accommodating the Governor's views on remedy, the Attorney General was only following accepted legal practice:

> "We note that, where there is a policy disagreement between the Attorney General and the Governor or his designee, the appropriate procedure would be for the Attorney General to appoint a special assistant to represent the Governor's interests."

Secretary of Admin. & Fin. v. Attorney General, 326 N.E.2d 334, 339 (Mass. 1975).

prisons." *Graddick v. Newman,* 453 U.S. 937, 941 (1981) (Opinion of Justice Rehnquist). The same thing surely can be said regarding the district court's order closing down Louisiana's higher education boards and merging its Law Centers into one, contrary to the wishes of all parties.

The Respondents' assertion that Attorney General Guste's state court petition "complained of the conduct of Governor Roemer, John N. Kennedy, Joseph J. Levin, Jr., and Carla Calobrisi *solely* in connection with case number 80-3300," Governor's Brief, p. 9 (their emphasis), ignores General Guste's averral (¶10, Guste App. at 72a) that respondents "have illegally purported to act as the legal representative for the State of Louisiana *in several different civil actions and proceedings in which the State of Louisiana is a party*" (our emphasis). That General Guste was complaining about Special Counsel Kennedy's conduct in other cases as well, certainly is no secret to Mr. Kennedy, who told the Middle District of Louisiana, in the case cited at p. 19 of his Brief to Your Honors:

> "As the Court probably knows, Louisiana is currently embroiled in a number of other major pieces of litigation in Louisiana federal courts. One is United States of America v. State of Louisiana . . . The other is Clark, et al. v. Roemer. . . .
>
> "The point is that the Governor and the Attorney General have disagreed before, both in the instant litigation and in other cases important to the State."

Memorandum on the Issue of Who Represents the State filed in support of Motion to Recognize the Governor of Louisiana as the Representative of the State of Louisiana, *Williams v. McKeithen,* No. 71-98-B (M.D. La. July 20, 1990) (R. Doc. 545, Exhibit 8). Thereafter, the Attorney General and the Governor were plainly at odds at the Bar of the Supreme Court of the United States. Given this history, and Special Counsel Kennedy's own admission, 1990 WL 265971 *2, it hardly lies in Governor's counsel's hands to

deny Louisiana *ex rel.* Guste, and the General himself, of a hearing in state court on this matter of vital internal allocation of Sovereign authority. To borrow from Holmes' figure, *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 25 (1913), this converts "the master" of his claim into the servant of the Governor. Surely the dispute between Attorney General Guste and Governor Roemer extends beyond No. 80-3300, as attested to by Mr. Kennedy's own artful pleading in Federal Court. And, most assuredly, the question of General Guste and Governor Roemer's respective authority under Art. IV, §§ 5 and 8, of the Louisiana Constitution 1974 is a matter that can only be decided definitively by the Louisiana Supreme Court.

CONCLUSION

For the foregoing additional reasons, the relief previously prayed for should be granted.

Respectfully submitted,

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